

In the Matter of the Impasse Between)	
)	
CITY OF EL SEGUNDO)	
)	
Public Employer)	
)	FACTFINDING PANEL REPORT
- and -)	
)	PERB Case No. LA-IM-200-M
EL SEGUNDO CITY EMPLOYEES ASSN.)	
)	
Exclusive Representative)	
_____)	

COMPOSITION OF THE FACTFINDING PANEL:

Neutral Chairman:	ROBERT BERGESON, Arbitrator/Factfinder 13351-D Riverside Drive #142 Sherman Oaks, CA 91423
City Member:	LAURA KALTY, Esq., Liebert Cassidy Whitmore 6033 W. Century Blvd, 5 th Floor Los Angeles, CA 90045
Association Member:	RALPH ROYDS, President Public Labor Advisors, Inc. 6285 W. Spring Street, Suite 355 Long Beach, CA 90808

PRESENTING EVIDENCE/ARGUMENT TO THE PANEL:

On Behalf of the City:	Steve A. Filarsky, Esq., Filarsky & Watt Greg Carpenter, City Manager Martina Dijkstra, Human Resources Director
On Behalf of the Association:	Wendell Phillips, Chief Counsel, Phillips & Rickards Nick Petrevski, Engineering Technician Ron Griffin, Fire Equipment Mechanic Mike McKinley, Water Maintenance Worker James Amezcua, Revenue Inspector

BACKGROUND AND PROCEDURAL HISTORY

The City of El Segundo (City) bargains with five employee groups. In addition to police, represented by the El Segundo Police Officers Association (POA) and firefighters, represented by El Segundo Firefighters Association (ESFA), the city meets and confers with the Police Support Services Association (PSSA), which is represented by the International Brotherhood of Teamsters, El Segundo Supervisor/Professional Association, the El Segundo Police Managers Association (PMA) and the El Segundo City Employees Association (ESCEA or Association). A successor memorandum of understanding (MOU) with the Association, which represents the largest bargaining unit in the City consisting of about 65 employees, is at issue.

In fiscal year 2003-2004, employees represented by the Association began a biweekly work schedule of nine days with a total of 80 hours during which facilities employing Association-represented employees were closed on alternate Fridays, with employees working an extra one and a half hours every other Friday. Prior to the beginning of fiscal year 2011-2012, the City proposed a 4-day per week, 10-hour per day schedule including furloughs of four hours per week. The City's rationale for that 36-hour workweek was a need to reduce salaries by some 10 percent. The Association successfully opposed that idea and employees it represents have since been working a biweekly 4/10 schedule.

The aforementioned two-year MOU was extended through September 30, 2014. In anticipation of expiration thereof, on August 26, 2014, the parties began to meet and confer over a successor contract. The City and the Association do not agree on the exact number of face-to-face negotiating sessions they have had but the Association presented its "final" offer to the City on December 9, 2015 and the City presented its "last, best and final" offer (or LBFO) at about that same time. The City's LBFO was rejected overwhelmingly by the Association's membership and the parties then agreed they had reached an impasse.

A number of sessions with a representative of the State Mediation and Conciliation Service proved to be unsuccessful in reaching agreement on a successor MOU and in April of 2016, the Association requested that the state Public Employment Relations Board (PERB) submit to the parties a list of names from which they could select the neutral member of a factfinding panel. The

person ultimately selected was Arbitrator/Factfinder Robert Bergeson. The City selected Attorney Laura Kalty of the law firm of Liebert Cassidy Whitmore to be its panel member, with the Association designating Ralph Royds, president of Janis Labor Advisors, to be its representative.

On June 21, 2016, a hearing was held at El Segundo City Hall in which the City and the Association were offered a full opportunity to present evidence to the panel in support of their respective positions on each issue. Although with the concurrence of the parties the panel then attempted some post-hearing mediation, as the state mediator had been, they were unsuccessful in assisting the parties to reach a resolution of their dispute. Accordingly, it was agreed the panel should write the present report summarizing the parties' positions and opining as to how the parties should resolve the remaining issues. In that regard, Chairman Bergeson drafted the present report for review by partisan panel members Kalty and Royds and the instant copy is the result of their collective efforts.

RELEVANT FACTORS

Subsection 3505.4(d) of the Government Code provides as follows:

In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria:

- (1) State and federal laws that are applicable to the employer.
- (2) Local rules, regulations, or ordinances.
- (3) Stipulations of the parties.
- (4) The interests and welfare of the public and the financial ability of the public agency.
- (5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.
- (6) The consumer price index for goods and services, commonly known as the cost of living.
- (7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

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- (7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

- (8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

Any criterion which has not been relied upon by the parties has not been considered in arriving at the findings and recommendations made herein.

ISSUES

As stated by panel Chairman Bergeson during the factfinding hearing, because this process is not quasi-judicial as is true of arbitration but rather quasi-legislative, there is no burden of proof as that concept is known under civil procedure. There is nevertheless a burden of persuasion in the sense that the party advocating a change from the status quo should be expected to provide solid rationale for the change sought. As will be seen, one key argument advanced by the City with regard to several proposals in its LBFO fails to meet that standard.

EXCLUSION OF PAID LEAVES AND EMPLOYER PAID MEMBER CONTRIBUTION FROM OVERTIME CALCULATION

Association's Position

Although the MOU currently provides for inclusion of overtime, holiday and vacation pay and compensatory time in calculating the 40 hours necessary each week to trigger the paying of overtime, specifically excluded from that calculation hours are attributed to sick leave. Although that approach is typical of Southern California cities, including sick leave usage toward the 40 hours is the norm in Northern California and the relevant paragraph in Article 2.02 of the MOU should be changed to reflect that more equitable provision. Instead, the City has proposed adding to exclusions vacation usage.

City's Position

Not only has the Association failed to present persuasive evidence to support including sick leave usage in calculating the 40 hours needed to trigger overtime compensation, a number of months ago the City agreed to a new three-year MOU with ESFA which will exclude most, if not

all, sick leave usage in computing the hours necessary to qualify for overtime. These parties' MOU should come into compliance with that of the City and ESFA.

Recommendation

See below.

EDUCATIONAL INCENTIVE PAY

City's Position

The MOU currently provides for payment of a stipend to employees holding a job not requiring a bachelor's degree who obtain such a degree in public administration, business administration or another "job-related major . . . approved by the department head." This provision has been in the MOU since prior to October 2000 yet only five bargaining unit members have availed themselves of it. It therefore appears to be unnecessary and although the unit members who have qualified for the incentive should continue to receive it and current unit members should be grandfathered in so that any courses completed in anticipation of qualification will not have been for naught, the provision should be eliminated for employees hired after the successor MOU has been agreed upon. Moreover, the City's agreement with ESFA does not contain such a provision.

Association's Position

The educational incentive should remain without modification.

Recommendation

See below.

LONGEVITY PAY

City's Position

Although longevity pay has long been a benefit available to Association-represented employees, no such provision exists in the City's MOUs with ESFA and the POA. In order to make this bargaining unit consistent with those, the provision should be eliminated.

Association's Position

Employees represented by the Association are clearly not firefighters or police officers. That is abundantly clear when one compares their paychecks. Particularly by virtue of passage of the

recent transient occupancy tax (Measure B), this City which once contemplated implementing furloughs in order to balance its budget no longer has such a problem. Indeed, never once during negotiations has the City argued ability to pay. Accordingly, incentive to stay with the City should remain in the MOU.

Recommendation

See below.

NO LAYOFFS

City's Position

ESFA recently agreed to delete from its MOU a provision prohibiting the City from laying off employees during its term. The Association should follow ESFA's lead and agree to do the same.

Association's Position

The no-layoff provision was obtained by the Association as a quid pro quo for concessions made in prior negotiations. The City has provided no evidence the provision has been detrimental in any manner and it should accordingly remain in the parties' agreement.

Recommendation

See below.

HEALTH INSURANCE

City's Position

The City's contribution to premiums for group medical insurance should be capped at \$1160.71 per month for full-time employees and half that amount for permanent part-timers.

Association's Position

The City expects Association members to agree to a cap of less than \$1,200 per month yet the City recently agreed with ESFA that the cap for firefighters will be \$1,425 per month. Particularly considering how much more firefighters earn than miscellaneous employees represented by ESCEA, that proposal is greatly unfair.

The Association will agree to maintain the current cap of \$1,600 if the City would agree to pay at least 75% of unit members' medical premiums notwithstanding the amount to which it might

rise. Alternatively, caps of \$1,400 and \$700 would be acceptable if the status quo is maintained with regard to other issues on the table.

Recommendation

See below.

Recommendation Concerning OVERTIME, EDUCATIONAL INCENTIVE, LONGEVITY PAY, LAYOFFS and HEALTH INSURANCE

These issues are interrelated by virtue of the parties' positions concerning them. On the one hand, the City advocates elimination of educational incentive and longevity pay because firefighters do not have such a benefit, elimination of the no layoff provision because EGFA so conceded during its most recent negotiations and exclusion of EPMC in calculating the overtime rate because the firefighters have never had it. Notwithstanding that rationale for its position on those issues, in its LBFO the City expects this Association to accept a limit on the amount the City will contribute toward ESCEA-represented employees' medical premiums which would be considerably lower than that EGFA has agreed to. As the Association argues, particularly because its members earn less to considerably less than firefighters, to require general employees to potentially pay \$265 more per month than firefighters would be patently unfair. More than that, it would be illogical since the two classes of employees are members of the same medical groups so the cost of insurance to firefighters and Association-represented employees is the same and the City provided no evidence to support such a patent inequity.

Parenthetically, there is *some* evidentiary support for the City's position on certain of the other items now addressed. For example, educational incentive pay is a standard part of collective bargaining agreements in certain industries, particularly K-12 school districts and community college districts. Because of the nature of the services they provide, that is true even for employees holding non-faculty positions. However, it is not so common for employees such as those represented by the Association and it goes without saying that although this educational incentive provision was obviously of importance to some employees 16 years ago, it has been of no value to the great majority of the bargaining unit. Similarly, although the City's survey indicates general employees of the cities of Culver City, Hawthorne, Redondo Beach and Torrance have MOUs containing a

longevity pay provision, that is not so of MOUs covering like employees of Gardena, Hermosa Beach, Inglewood, Los Angeles, Manhattan Beach and Santa Monica nor of employees of the County of Los Angeles.

Based upon the above, it is the opinion of Chairman Bergeson that the City and ESCEA should agree to one of two alternatives for these five issues. The City should concede to the Association's position on the first four items with the Association agreeing to cap the amount the City pays toward monthly medical insurance caps at \$1,160.71 and \$580.36 as advocated by the City or the parties should agree to the position taken by the City in its last, best and final offer on the first four issues and agree to City-paid medical insurance at the same \$1,425 per month the firefighters will pay. As the Association has said, the City has provided no evidence of an inability to pay that additional amount and insofar as unanticipated financial problems may occur in the future, elimination of longevity pay, educational incentive pay and the prohibition against layoffs should far more than cover them.

LEAVE PAYOUTS

City's Position

Article 3.13 of the MOU entitled Termination Pay should be changed from "Payment shall be made based on the definition of 'regular rate of pay'" to "Payment shall be made *at the base salary hourly rate.*"

Association's Position

The City has presented no evidence nor even any rationale for advocating alteration of Article 3.13 and it should be retained as written.

Recommendation

Because the City has provided no persuasive argument to support the proffered change to Article 3.13, Chairman Bergeson sees no need for a change like this which would impact everyone in the bargaining unit and he therefore recommends that the article remain as presently written.

WORK SCHEDULE

City's Position

The work schedule for these employees should be returned to the 9/80 principle which existed until about five years ago. So doing will allow for greater convenience to citizens by having services fully available on Friday. During pre-impasse negotiations the Association discussed the possibility that if there was a return to a 9/80 schedule that there could be a collection of data as to the extent to which the public utilized City services each Friday versus other weekdays. The City has no objection to such an approach.

Association's Position

The Association was initially opposed to creation of a 4/10 schedule. However, bargaining unit members have adjusted to it and particularly because of child care responsibilities, desire that it be maintained. The City has made no study itself which would support returning to a 9/80 schedule much less contracting with a neutral outside entity to perform such a study. Indeed, the only rationale presented was the unsupported assertion that members of the public have been inconvenienced by having City Hall closed on Fridays. The City offered no explanation for why that would require compelling bargaining unit members who do not work at City Hall to return to a 9/80 schedule. Because the City has not even considered such a middle ground, it is almost a certainty that imposition of a 9/80 schedule for all ESCEA-represented employees would be perceived to be a hostile act.

Recommendation

The Association's point about the City having only cited City Hall employees is not entirely accurate. Although it did so only in passing and provided no evidentiary support for the assertion during the factfinding hearing, the City expressed a concern that some supervisors work out of City Hall whose employees are assigned elsewhere. If that is accurate, it would cast doubt on the feasibility of ESCEA's tacit assertion that many members of the bargaining unit could easily remain on a 4/10 schedule while others worked a 9/80 without inconvenience to City operations. Moreover, in the opinion of the panel chairman, creating disparate schedules for bargaining unit employees has the same potential for a negative affect on morale as the City's proposal to treat all Association-represented employees as second class citizens vis-a-vis firefighters with regard to medical insurance premiums. It is therefore the opinion of Chairman Bergeson that all unit members should revert to the former 9/80 schedule. However, that recommendation is not without qualification.

Perhaps the Association is correct that only a small number of citizens have been inconvenienced by having City Hall closed each Friday. If so, tabulating information about Friday usage following reopening City Hall on such days could conceivably be compared to Mondays through Thursdays or perhaps to the amount of citizen visits to City Hall on Fridays during the 2003-2004 through 2004-2011 period. Based on the paucity of evidence presented to the panel no specific metric(s) will be recommended. Instead, it is suggested the parties agree to creation of a committee composed of an equal number of management representatives and representatives of the Association to arrive at a plan for assessing the need for the 9/80 schedule. Following the passage of a reasonable period of time, say 12 months, the committee would summarize the data received and recommend continuation or modification of such 9/80 schedule.

Panel Chairman Bergeson having so opined, the concurring and dissenting opinions of partisan panel members Kalty and Royds follow hereafter.

DATED: October 31, 2016

Respectfully submitted,



Robert Bergeson
Panel Chairman

Partisan panel members Kalty and Royds concurrences and dissents begin on page 11 below.

**El Segundo City Employees Association Concurrence in Part and Dissent in Part
to the Fact-finding Panel's Findings, Conclusions and Recommendations**

El Segundo City Employees Association Association Representative to the Fact-finding
Panel

Ralph Royds

As the El Segundo City Employees Association ("ESCEA") representative to the Fact-finding Panel, I concur in part, and dissent in part to the Fact-finding Panel Chair's Findings, Conclusions and Recommendations in the above referenced matter and add the following facts in support thereof:

I. Exclusion of Paid Leave Time Overtime Calculation

City's Exhibit #25 represents its Last, Best, Final Offer (LBFO). The LBFO refers to "base salary hourly rate of pay" and "regular rate of pay" in modifying Article 2.02 as proposed and also states the City would provide the definition of the term "regular rate of pay." The City did not provide during bargaining or the fact-finding hearing the definition for these terms. During the hearing the ESCEA stated the "regular rate of pay" definition must be compliant with state and federal law. The City and the ESCEA have yet to agree on how to define this term. Both the Firefighters and Police Officers Association MOU's (City Exhibit 30, Section 2.04 for the ESFA; Section 2.02 of the ESPOA MOU found online at the City's website) define the regular rate of pay as it is defined by federal law under the Fair Labor Standards Act, specifically 29 CFR 778.108. *No explanation was offered by the City regarding their refusal to define the terms they chose to use as part of their demands/offers.*

II. Alternative Work Schedule

The City's LBFO identifies MOU Article 3.08 as the operative section to require the ESCEA to change to the 9/80 work schedule from the current 4/10 schedule with "every other Friday dark." The 4/10 schedule is contained in Article 3.19 "Work Schedules" and not Article 3.08. The language of Article 3.08 is clearly intended to permit an individual employee to request a schedule change, and with the agreement of management, make such a change. Article 3.08 does not apply to the entire bargaining group represented by ESCEA. Aside from this factual error by the City, nowhere in the bargaining history provided by the City's exhibits, the ESCEA exhibits, or statements of the parties during fact-finding is there to be found a procedural framework for the implementation of the 9/80 work schedule. Additionally, there's no agreement or even a discussion on how the implementation of the 9/80 work schedule changes the other mandatory (and inter-dependent) items of negotiation in the MOU.

The City admitted during fact-finding it did not conduct, nor did it contract for an evaluation of the service or operational impacts of implementing the 9/80 work schedule. Such an evaluation is a requirement of Article 3.19, subsection 1.A.b in order

for the City to agree to a reduced workweek schedule of not less than 9 hours per day in a 36 hour workweek. The industry standard for a 9/80 work schedule is composed of one workweek of 36 hours (9 hour days x 4 days) followed by a workweek of 44 hours (9 hours x 4 days + 8 hours usually on a Friday). Without an evaluation of the service and operational impacts of a 9/80 schedule having been made prior to an imposition of it by the City, an unfair practice charge against the City is likely. Multiple terms and conditions of employment addressed in the ESCEA MOU are arguably changed by the 9/80 schedule, yet they were not bargained for or discussed according to the fact-finding record. Some of them include:

- Article 3.07 "Breaks" - when breaks are scheduled during a 9/80 workday is different than a 4/10 workday and thus negotiable;
- Article 2.28 "Paid Family Leave" - how is this benefit calculated under the 9/80?;
- Article 2.24 "Standby Duty" - how is this daily pay term/condition of employment affected by an additional workday every pay period? If it was 8 days of pay on the 4/10 schedule, is it 9 days on the 9/80 schedule?;
- Article 2.18 to 2.20 "Vacation" - accrual, usage and sale are substantially and materially changed by the added number of work days the 9/80 schedule requires. The increased number of workdays on the 9/80 schedule, without a commensurate increase in the accrual rate, results in a vacation compensation decrease. An example - 12 days of vacation earned per year on either the Original or Alternative Accrual Schedule is equal to 3 work weeks vacation compensation on the 4/10 schedule, but on the standard 9/80 schedule the same 3 work weeks of vacation will require 13 vacation days. Furthermore, this section defines a "day" for the purposes of vacation as 8 hours, not 9 (or even the current 10 hour workday).
- Article 2.16 - "Holidays" - the Friday after Thanksgiving was removed in 2011 unless it is a regularly scheduled workday. Depending on the cycle chosen, it may need to be added as an enumerated holiday. The 11 agreed upon paid holidays in Section 1 is compensation equal to 110 hours of pay on the 4/10 schedule. According to Section 3 (the first one) holiday pay will never be more than 9 hours per holiday on the 9/80 schedule which is at least a 10% reduction in holiday compensation. The same argument, an overall compensation reduction, applies to Section 4 on "Floating Holidays" and the second Section 3 on "Personal Leave/Floating Holiday."
- Article 2.02 - Compensatory Time usage is limited to 40 hours, currently equal to one work week on the 4/10 schedule. To obtain the same benefit of one work week of usage on the standard 9/80 schedule an employee covered by this MOU would be limited to selecting a work week of only 36 hours (9 work hours x 4 days); a 50% reduction in the choice of work weeks to to utilize this limited negotiated right.
- Article 2.08 "Differential Pay" - this hourly rate of pay increase is dependent upon the number of hours worked between 5:00 pm and 6:00 am. The shorter workday required by the 9/80 schedule, either 9 hours or 8 hours, will result in a change in compensation from the current 10 hour workday depending on the actual start and end times of the workday. What will the "new" workday hours actually be?

Recommendations

The ESCEA proposed several findings of fact in its presentation. Essential among them were:

- the City was not claiming an “inability to pay” argument for the contract impasse;
- the bargaining unit represented by ESCEA is the largest group in the City and represents the lower paid classifications of city workers;
- Health insurance premiums are the same for all non-sworn city workers, including department heads and the City Council;
- the ESCEA represented full-time employees are paid the least for health insurance premium reimbursement, and their monthly amount is not included as part of their compensation earnable for computing the CalPers retirement benefits;
- ESCEA retirees receive the lowest monthly medical premium reimbursement of any group of full-time city employees. ESCEA represented employees were not included in the recent plan whereby some city employees, including Council members, were given the option to either include monthly health insurance premium reimbursements as part of compensation earnable or were paid the greater majority of their monthly benefit in cash;
- The elimination of a formula for cost sharing regarding future increases in health insurance premiums for ESCEA represented employees virtually guarantees that 100% of any increased costs for health insurance premiums will be borne by workers;
- There is no data available regarding any need to shift from the current 4/10 schedule currently in place for ESCEA members;
- There is no bargaining data available regarding any need to exclude EPMC “buy-back” from the definition of “regular rate of pay,” and the city has yet to define that term.

The City admitted during fact-finding it was not claiming an inability to pay. The Panel Chair also noted this fact in his conclusions. The parties did not dispute that ESCEA represents the largest group in the city, and the data provided during fact-finding confirmed these employees are in the lowest paid classifications of city workers. There was no dispute on the issue that health insurance premiums are the same for all non-sworn city workers including department heads and the City Council Members, and the Panel Chair also noted this fact in his conclusions. The data provided confirmed that ESCEA represented full-time employees are paid the least for health insurance premium reimbursement and their monthly amount is not included as part of their compensation erasable for computing their CalPers retirement benefits. The data provided also confirms that ESCEA retirees receive the lowest monthly medical premium reimbursement of any group of full-time city employees (because their monthly benefit is limited based on the amount received by active employees); City exhibit #31 demonstrates this fact. The data provided proves that the elimination of the formula for cost-sharing regarding future increases in health insurance premiums for ESCEA represented employees virtually guarantees that 100% of any increased cost for health insurance premiums will be born by these employees. The city admitted during fact-finding they were unable to produce any data demonstrating an need to shift from the

current 4/10 schedule currently in place for ESCEA represented employees. The city did not provide during fact-finding any data regarding their desire to exclude EPMC from the definition of "regular rate of pay" and did not provide the definition for that disputed term.

One of the primary goals of fact-finding is to assist the parties in achieving a negotiated settlement. The Panel Chair indicated during fact-finding a willingness to assist the parties, if requested to do so, in mediating settlement discussions. I concur with that position and remain willing to do so if called upon.

I concur with the Panel Chair's conclusions with regard to the issue of Leave Payouts in Article 3.13, the City did not offer any persuasive evidence to make that change. The City also wanted to exclude "any paid leave time taken" from hours worked for the purposes of calculating overtime. The City did mention during the fact-finding hearing it wanted to achieve consistency between the various MOU's in the city. A review of the firefighters MOU and the Police Association MOU show that if that if consistency is the City's goal, they have selected the ESCEA as the standard-bearer for the race to the bottom. Neither the firefighters or the POA have such a draconian term in their MOU's which destroys the City's argument they are trying to achieve consistency.

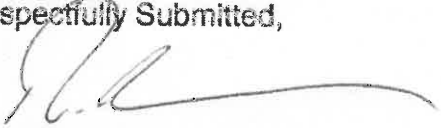
I concur with the recommendations made by the Panel Chair with regard to the elimination of the provisions concerning longevity pay and educational incentive pay for those employees hired after the date of ratification of a successor MOU, and also removal of the "no layoffs clause" as both reasonable and prudent as part of the give-and-take process to get an agreement. In return, however, my recommendation for the City is to provide the ESCEA with the same monthly health benefit premium reimbursement already agreed to with the Firefighters. As the Panel Chair has correctly analyzed, there is no difference in the premiums for these groups and the Firefighters are compensated substantially higher than the ESCEA members. That disparity results in the lower paid classifications paying more for the same benefit as the higher paying classifications.. The items the ESCEA and the City have already indicated tentative agreement for or tacit approval of on their final positions in fact-finding should also be agreed to in this final solution.

With regard to the issue of imposing the 9/80 work schedule, the analysis above indicates I do not concur with the Panel Chair or the City's Panel Representative. To state the City's position on this is not well thought out would be a significant understatement. Frankly, I would be embarrassed to put my name to such a poorly supported policy proposal unless creating ill-will among the affected employees is the ultimate goal. To threaten to impose wholesale work schedule changes upon the largest employee group in the city with the only justification being some vague and unsupported notion of providing more service is certain to create hostility in the workforce and an invitation to litigation. If the City had conducted a credible analysis and evaluation of the impact of this schedule change, the merits of the proposal would at least be defined. But here, the City has done nothing to justify its position.

For example, in 2015 the City expended considerable time, energy and cost on the Wiseburn USD Aquatic Center Study. One of the primary goals of this study was to assure the taxpayers the City could be responsible for managing the facility and paying the operating costs of the facility without an increase in overall Aquatic and Public Works operating costs. The point here is not whether or not the City's policy goal was the correct one, but that the City had defined what its goal would be in advance and conducted research to determine if it could achieve that goal. In the instant case, the City has done exactly the opposite. To use an analogy, the City will be firing first and aiming later. The ESCEA has the right and the opportunity to demand bargaining on a successor MOU as of October 1, 2016. Even if the City imposed the new schedule immediately, it would have to propose bargaining on the numerous problem areas I've identified above related to that schedule change. It is doubtful the ESCEA would agree to engage in what could be considered piecemeal bargaining with the City and would instead initiate PERB complaints.

Finally, the City is married to the language and intent of its LBFO. Obviously intended as "leverage" to induce an agreement with ESCEA with the multi-year offer for a successor MOU, the LBFO clearly states that in "Year 2 - 3% Base salary increase and employees pay full 7% PERS Member Share (EPMC=0%) along with "all of the remaining items are the same." There is no such thing as a Year 2 as part of a legally enforceable impasse resolution that results in an employer's imposition of terms and conditions of employment. The Public Employment Relations Board has ample precedent to show that impasse can not be used to create multi-year conditions of employment. PERB Decision No. 2308-M would be instructive on this issue.

Respectfully Submitted,



Ralph Royds
ESCEA Panel Member
September 9, 2016

City of El Segundo and El Segundo City Employees Association (ESCEA)
PERB Case No. LA-IM-200-M

City of El Segundo's Concurring and Dissenting Opinion to the Factfinding Report

City of El Segundo's Representative to Factfinding Panel
Laura J. Kalty

As the City of El Segundo's representative to the Factfinding Panel, I concur in part, and respectfully dissent in part, to the Factfinding Report issued by Chairperson Robert Bergeson.

I. Background and Procedural History

The City of El Segundo bargains with *six* employee groups, including the Police Support Services Employees Association (PSSEA) and the Supervisor Professional Employees Association (SPEA). With a 9/80 schedule, employees work 9 hour days, with alternating Fridays off; on the working Friday, employees work 8 hours, not 10.5 hours.

II. Exclusion of Paid Leaves and Employer Paid Member Contribution ("EPMC") from Overtime Calculation

Chairperson Bergeson does not specifically analyze the City or ESCEA's position as to paid leave exclusions, or make any express recommendation as to the exclusion of paid leaves and EPMC from overtime calculations. Rather, Chairperson Bergeson analyzes five issues cumulatively, and recommends that if ESCEA agrees to the City's position on health, then the City should agree to ESCEA's position on the other four issues; if ESCEA does not agree to the City's position on health, then ESCEA should agree to the City's position on the other four issues.

I therefore respectfully dissent to Chairperson Bergeson's recommendation, and will address the substance of the City's position as to excluding EPMC and paid leaves from the calculation of overtime. First, as to EPMC, the City and ESCEA tentatively agreed to eliminate any employer paid member contributions, with the members agreeing to pay their 7% EPMC upon ratification, in exchange for a 7% salary offset. Accordingly, with EPMC being eliminated, there is no substantive dispute – there will not be any EPMC to include in overtime calculations going forward, and any future agreement between the parties should simply confirm this reality.¹

Second, as to paid leave exclusions, the City's position is that employees should be paid consistent with what the federal overtime laws require, and not more generously. Under the Fair Labor Standards Act ("FLSA"), only hours *actually worked* are included for purposes of calculating overtime. Overtime is calculated once an employee has *actually worked* in excess of 40 hours in a seven day work period. When overtime is paid, it is typically paid at time and one half. Under the current MOU, when employees are off work – either due to vacation or sick time

¹ It should also be noted that the factfinding report incorrectly states that the Fire group never had EPMC calculated as part of the overtime rate of pay. The Fire group previously had EPMC calculated as part of the overtime rate of pay, however, this was eliminated in the last round of MOU negotiations.

— and using their leave accruals so that they are *paid* their full salary, these employees are able to nonetheless count these same hours off work — related to paid vacation or sick time — toward the 40 hour overtime threshold. Thus, if an employee called off sick 3 days of his/her current 4 day week, but then picked up an additional shift, that additional shift would be paid at an overtime rate — because the 30 hours of sick time would be counted toward the overtime threshold. Both the Fire and PSSEA employee groups agreed with the City to correct this issue and exclude vacation and sick leave from any overtime calculations, and the POA has agreed with the City to exclude sick leave from any overtime calculations. ESCEA employees should not be treated any differently, as a matter of fairness within the City of El Segundo, and as a matter of law pursuant to the FLSA. Moreover, the City's position is that these paid leave exclusions would only apply in cases of voluntary overtime, and not in cases of emergency overtime.

III. Educational Incentive Pay

Chairperson Bergeson does not specifically analyze the City or ESCEA's position as to Educational Incentive Pay, or make any express recommendation. Rather, Chairperson Bergeson analyzes five issues cumulatively, and recommends that if ESCEA agrees to the City's position on health, then the City should agree to ESCEA's position on the other four issues; if ESCEA does not agree to the City's position on health, then ESCEA should agree to the City's position on the other four issues.

I therefore respectfully dissent to Chairperson Bergeson's recommendation, and will address the substance of the City's position as to Educational Incentive Pay. As noted by Chairperson Bergeson, the MOU currently provides for payment of a stipend to employees holding a job not requiring a bachelor's degree who obtain such a degree in public administration, business administration or another "job-related major . . . approved by the department head." This provision has been in the MOU since prior to October 2000, yet only five bargaining unit members have availed themselves of it. It therefore appears to be unnecessary. The City never sought to eliminate educational incentive pay for current employees, but rather to eliminate this specialty pay for future employees. Fire, PSSEA and POA employees all agreed to limits on educational incentive pay, and ESCEA employees should do the same. Specifically, unit members who qualify for the incentive should continue to receive it, but otherwise the provision should be eliminated for future employees.

IV. Longevity Pay

Chairperson Bergeson does not specifically analyze the City or ESCEA's position as to Longevity Pay, or make any express recommendation. Rather, Chairperson Bergeson analyzes ~~five issues cumulatively, and recommends that if ESCEA agrees to the City's position on health,~~ then the City should agree to ESCEA's position on the other four issues; if ESCEA does not agree to the City's position on health, then ESCEA should agree to the City's position on the other four issues.

I therefore respectfully dissent to Chairperson Bergeson's recommendation, and will address the substance of the City's position as to Longevity Pay. As a matter of economic efficiency and prudence, the City sought to minimize overtime and specialty pays consistently in its

negotiations with all of the applicable bargaining groups. Longevity pay did exist in both the Fire and POA MOUs. The Fire and PSSEA groups agreed to eliminate longevity pay for future employees, and the POA agreed to decrease the levels of longevity pay for future employees. ESCEA employees should do the same, and eliminate longevity pay for future employees.

V. No Layoffs

Chairperson Bergeson does not specifically analyze the City or ESCEA's position as to the "no layoffs" language in the current MOU, or make any express recommendation. Rather, Chairperson Bergeson analyzes five issues cumulatively, and recommends that if ESCEA agrees to the City's position on health, then the City should agree to ESCEA's position on the other four issues; if ESCEA does not agree to the City's position on health, then ESCEA should agree to the City's position on the other four issues.

I therefore respectfully dissent to Chairperson Bergeson's recommendation, and will address the substance of the City's position as to the current "no layoffs" language in the MOU. At some point during the economic recession, and when employees were making other concessions, the City agreed to the language in Article 3.21 that there would be no layoffs during the term of the MOU. As the concessions have been restored, the City is now seeking to eliminate the guarantee that there will never be any layoffs. The City does not anticipate any layoffs; however, this is a management right the City wishes to preserve in the event it becomes necessary. The Fire and PSSEA groups agreed to remove this language from their MOUs, and so should ESCEA.

VI. Health Insurance

Chairperson Bergeson does not specifically analyze the City or ESCEA's position as to Health Insurance, or make any express recommendation. Rather, Chairperson Bergeson analyzes five issues cumulatively, and recommends that if ESCEA agrees to the City's position on health, then the City should agree to ESCEA's position on the other four issues; if ESCEA does not agree to the City's position on health, then ESCEA should agree to the City's position on the other four issues.

I therefore respectfully dissent to Chairperson Bergeson's recommendation, and will address the substance of the City's position as to Health Insurance. For all of the employee groups at the City, health insurance benefits are calculated based on a formula. The specific formulas and the dollar amount of health benefits provided differs among the groups given the long history of negotiating individually with the groups, and based on what each group considered to be its priorities – whereas one group may have focused on salary, another group may have focused on health benefits. Thus, the groups have different levels and amounts of health benefits, and the City has not sought to equalize all of these benefits, and it would not be fair to do so now. What the City did seek to do was to put an end to the ever-increasing amount of health benefits based on the formula-method of calculating health benefits. And for all of the groups, based on what they had negotiated over the years, to freeze the formula and corresponding health benefits as of a particular date. The Fire and POA groups agreed to freeze their level of health benefits based on the rate in effect as of January 1, 2016. Above and beyond this, the City offered to PSSEA and ESCEA employees contributions at the rate of \$1,200/per month. The City's contributions

for group medical insurance should be capped at \$1,200 per month for full-time employees and half that amount for permanent part-time employees.

VII. Leave Payouts

I dissent to Chairperson Bergeson's recommendation that leave payouts continue to be paid at the regular rate of pay. "Regular rate of pay" is a term of art and defined by law pursuant to the FLSA. FLSA overtime (time worked beyond 40 actual hours in a work period) must be paid at the "regular rate of pay," which is defined to include not just an employee's base salary but potentially other components of specialty pay, such as educational incentive and longevity pay.

Separate and apart from earned overtime, employees earn leave accruals – time off from work for vacation and sick leave. When an employee misses work, they use their accruals so there is not gap in their pay. As a matter of law, when an employee leaves the City, the City is required to pay out an employee the value of any accrued vacation time. There is no such requirement as to sick leave. However, the City has generously agreed to pay out a portion of employees' sick time when they depart from the City.

The payout of these accruals has nothing to do with overtime. The "regular rate of pay" does not apply as a matter of law. In fact, there is no contract language which refers to or requires the pay out of accruals at the regular rate of pay. But, at some point, the City began paying out accrual cash outs at the regular rate of pay; the City thinks this should stop.

Chairperson Bergeson reasons that he does not see any need "for a change like this." The City disagrees. There is no rational basis to apply the federal overtime rate of pay to the cash out of leave accruals, and in fact there is no existing contract language which requires this. The Fire, PSSEA and POA groups have all agreed to end this practice, and so should ESCEA.

VIII. Work Schedule

I concur in part to Chairperson Bergeson's recommendation that all unit members should revert to the former 9/80 schedule.² However, I dissent to Chairperson Bergeson's recommendation that a committee be created to assess the need for a 9/80 schedule. The City and ESCEA met and bargained and mediated and discussed this specific issue for a period of close to two years, and have not been able to reach an agreement. They have exhaustively discussed and traded information on each side's position. The City believes the public should have 5-days a week access to City Hall and City services.

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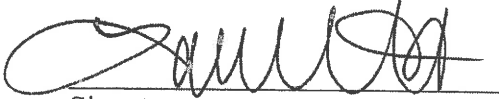
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² It should be noted that Library personnel should not be included in the proposed 9/80 work schedule as they have their own unique schedule due to extended hours, being open on Saturdays, and being subject to a 7(b) FLSA exemption, they are on a 3-pay period rotation work schedule.

In conclusion, based on all of the above, I hereby concur in part and dissent in part to the panel Chairperson's Factfinding Report.

Laura J. Kalty, City of El Segundo's representative to the factfinding panel

A handwritten signature in black ink, appearing to read 'Laura J. Kalty', written over a horizontal line.

Signature

10/23/16

Date